Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 159.

FOURTH NATIONAL BANK OF ST. LOUIS ET AL.,
APPELLANTS,

vs.

MORTON ALBAUGH, RECEIVER, &c., APPELLEES.

REPLY BRIEF FOR APPELLANTS.

ATTEMPTED DEPARTURE FROM ISSUES MADE BY PLEADINGS AND QUESTIONS CONSIDERED BY LOWER COURTS.

The brief for appellee closes with an attempt to shift the issues and to depart entirely from the questions involved in the lower courts by claiming a pledge of the fund in controversy by acts of Cross and Martindale independently of the March bill of sale (pages 51–55 of brief for receiver). It is clear from the record that nothing of the kind was hereto-

fore suggested. The answer of the receiver (Record, 133) specifically pleads the March bill of sale as the basis and only ground for his claim of a preference out of this property.

The decree (p. 173) follows the answer:

"That Morton Albaugh, as receiver of the First National Bank of Emporia, Kansas, upon his cross-bill filed March 21st, 1900, is entitled to the fund arising from the sale of the Sunny Slope property."

The circuit court of appeals in its opinion says:

"The trial court appears to have found in accordance with the contention of Albaugh, the receiver of the First National Bank of Emporia, that the bill of sale dated March 4, 1898, * * * was executed by C. S. Cross in favor of William Martindale * * * as trustee for said bank, to secure the payment of a very large sum of money which Cross then owed said bank. * * *

"We conclude that there was competent evidence to sustain the finding by the trial court that the bill of sale of March 4, 1898, was made to secure all of the indebtedness of Cross to the First National Bank of Emporia, and that from and after the execution of that instrument all of his personal property of every kind and description, except his personal effects, insurance policies and the contents in his house in Emporia, Kansas, stood pledged for that purpose."

The matters now brought up were not taken as being in the case or entitled to any consideration as grounds for the receiver's claim of lien. The letter of August 2, 1898, written by Cross to the comptroller, as well as the talk with Jobes, made no reference to any bill of sale, and, at best, are rather shadowy things to bring up against direct and posi-

tive evidence that written bills of sale did then exist; and on no theory are such statements competent evidence to prejudice the rights of appellants which had then vested in them under the July bill of sale.

The rule is well settled that the departure from the issues made and the questions considered in the lower courts which is attempted in this case will not be permitted.

Washington R. R. Co. *vs.* Bradleys, 10 Wall., 299.

Grosholz *vs.* Neuman, 21 Wall., 481.

But even if such claim had been made originally, there is no evidence showing an intention to give a lien independently of the bills of sale.

DELIVERY OF JULY AND NOVEMBER BILLS OF SALE.

The evidence is direct and explicit that there was a delivery by Cross to Martindale of the two bills of sale under which appellants claim. The only witness who had any knowledge upon the subject was Martindale. He testified:

"Q. I will ask you whether or not you have in your possession the original of an instrument mentioned as a bill of sale in the complaint, dated July 15th, 1898?

"A. Mr. Keilogg, my attorney, has it.

"Q. Is that the paper that you now hold in your hand?

"A. Well it has every appearance of it.

"Q. Do you know the signature of C. S. Cross?

"A. Yes.

"Q. State whether or not that instrument is signed by C. S. Cross?

"A. It is.

"Q. State when that instrument first came into your possession.

"A. I am not absolutely sure what date, but my best recollection is the 15th of July.

"Q. What year?

"A. Year of 1898."

* * * * * * *

"Q. Now state the circumstances that led up to this and all of the surrounding circumstances of the giving of this bill of sale.

"A. Mr. Cross, in the suit pending in the Lyon county court, was compelled to give a bond. * * * He asked me who would go on his bond, and I said I would. He said I wish (—) would call Colonel Whitley over. I telephoned him and called him over and said Mr. Cross has to give a bond in a suit, and we want you to sign it. We both signed it then. Some time after that, I don't remember just how long, Col. Whitley came in the bank and said, 'That is a pretty large bond which (we) signed for Mr. Cross the other day; it is perfectly safe, is it?' I said, 'I think so.' Mr. Cross was away at the time. When he came home I said, 'Col. Whitley is a little bit worried about that bond;' and he said, 'I think I ought to give you and Col. Whitley a bill of sale or mortgage to protect you, and protect you for the paper you have endorsed for me.' I don't know whether it was a bill of sale or mortgage. And he wrote the bill of sale or mortgage, whatever you call it.

"Q. I will ask you what you did with it?

"A. Well, in the first place I took it over to the hotel and was going to show it to Col. Whitley, but he wasn't in at the time, and I took it to my house and it remained there until after Mr. Cross's death.

"Q. Has it been in your possession ever since he gave it to you?

"A. After Mr. Cross's death I gave it to my attorney."

* * * * * * *

"Q. Now I will ask you whether or not you have in your possession a paper, a copy of which is attached to the bill of complaint and marked 'Exhibit D,' and dated Nov. 15th, 1898?

"A. Yes, sir.

"Q. Do you hold that paper in your hand?

"A. I do.

"Q. Is that signed by C. S. Cross?

"A. Yes.

"Q. You may state the circumstances that surround the giving of that paper.

"A. Mr. Cross came to my house on that day, at the time Mr. Jobes was there, and we did not know whether the bank would be closed or not; I didn't know how much paper I was on with Mr. Cross, and I said to him, 'How much paper am I on with you?' He said, 'That of New York, St. Louis and the Kansas City notes. (That is the Harvey note, and I was also security for the Union national for $10,000.00 there.) He went right into the other room where my desk was, and he remarked, 'Can I use your desk a minute?' I said, 'Yes.' He wrote this instrument and came out and handed it to me. That is about the sum and substance of it.

"Q. Have you had that in your possession ever since?

"A. Yes."

* * * * * * *

"Q. Were you interested in these notes which you have spoken of as being secured by these instruments in any way aside from being a joint maker thereon with Mr. Cross and an endorser on them with Mr. Cross?

"A. I had no personal interest in them at all, only as an indorser" (Record, pp. 136, 137, 138).

And on cross-examination:

"Q. Mr. Martindale, at the time of giving this bill of sale on July 15th, 1898, that was taken primarily to secure you

and Col. Whitley for going upon that bond which has been introduced in evidence?

"A. Yes.

"Q. And that was the talk with reference to it?

"A. Well, he spoke about securing Col. Whitley on the bond and paper I had endorsed for him" (Record, p. 139).

* * * * * * *

"Q. Mr. Martindale, I notice this bill of sale of July 15th seems to be written on two separate pieces of paper of the same kind of ruling and texture and has been folded together many a time and has all the while been in this position. What shape was it in when you first saw it?

"A. That would be a pretty hard question for me to answer.

"Q. You notice that something has been torn off above, did you not? Could it have been written on Sherman house letter-head?

"A. I always supposed it was written on bank letter-head and the heading torn off. All I know about it is that Cross handed it to me as it is.

"Q. Would you say it was not written on letter paper of the Sherman house in Chicago?

"A. I wouldn't say what paper, but it is just as it was handed to me by Mr. Cross.

"Q. Would you say you did not receive that from the hands of Mrs. Cross, widow of C. S. Cross, after C. S. Cross's death?

"A. I would."

* * * * * *

"Q. Did it (a box with papers received from Mrs. Cross after Cross's death) include any of those bills of sale that have been delivered here?

"A. It did not" (Record, pp. 142, 143).

Against that testimony there is nothing except surmises and the unfounded and unwarranted suspicions of counsel for the receiver. Because Martindale received from the

hands of Mrs. Cross, after Cross's death, some papers, counsel charges that the July and November bills of sale were among them, and had not been previously delivered to Martindale. He picks up scraps of writing, apparently made by Cross in despondent moods, which no one knows anything about, and parades them as competent evidence. At page 20 of his brief one of these papers, dated May 12, 1898 (Record, 169), is copied at length, with the prefatory statement that it is not competent evidence, and then at pages 36 and 47 he bases upon its statements an argument for the March bill of sale. Under no circumstances are these papers, including the letter of August 2, 1898, to the comptroller, competent evidence against appellants, unless it might be that parts of the comptroller's letter would be admissible for the purpose of impeaching Martindale.

The censure of Martindale by counsel is wholly gratuitous. There is nothing to justify any imputation upon his honesty as a man or his credibility as a witness. The very letter of Cross, which the receiver makes so much of, exonerates Martindale from blame for the condition of the bank. Cross says:

"Mr. Martindale will now learn for the first time how I have carefully deceived him, principally by way of substituted papers of which he has no knowledge. * * * I know of nothing further to add except as to Mr. Martindale—this—a terrible thing for him for he has trusted me without reserve."

Though Martindale was vice-president and a director of the bank, he had nothing to do with its active management. He was not a practical banker, and trusted to Cross. He was deceived and financially ruined through the misman-

agement of the man he trusted. But, in all fairness, we submit there is nothing in this record which justifies the charge that Martindale committed willful perjury when he testified to these bills of sale. Something more is needed beyond the breath of counsel to thus tarnish the good name established by a long life of fair, honest, personal dealing with his fellowmen. Counsel also seems to forget that he relies upon the testimony of the same witness to prove delivery of the March bill of sale.

NO SUPERIOR EQUITIES IN THE RECEIVER.

It is contended that there are peculiar equities in favor of giving this fund to the Emporia bank. The depositors and other creditors of that bank have the first claim upon the bank assets, but no equitable appeal will allow them to reach out and take in the individual property of the bank officers to the prejudice of the latter's individual creditors. The Sunny Slope property did not belong to the bank. There is no more reason to make a claim to it in favor of the receiver on merely equitable grounds than there is in favor of appellants. The $60,000 of appellants' money went to Cross. What use he made of it is not shown; but it is as likely to have gone into the Sunny Slope property as was the money he used out of the bank. The equities are by no means all on one side. If equity alone is to control the disposition of this money, all creditors should share in its distribution.

CROSS COULD PREFER CREDITORS.

As between appellants and the receiver, we must look solely to the bills of sale. Except for them, this fund, as part of the individual estate of Cross, would have gone to his administrator for the benefit of all his creditors, including the parties here disputing. Consequently, before the court can divert it as a preference for any creditor, there must be competent evidence to establish such favored creditor's right.

An insolvent or failing debtor may prefer one or more of his creditors, to the exclusion of others (Randall *vs.* Shaw, 28 Kan., 419; Tootle *vs.* Coldwell, 30 Kan., 125); so that it cannot be objected by a non-favored creditor that his equities are greater than are those of the favored one.

RULE THE SAME, WHETHER MARTINDALE WAS SURETY ONLY OR A JOINT PRINCIPAL.

The authorities cited in our original brief support this proposition, and especially does the case of National Bank *vs.* Ridenour, 46 Kan., 707, where the mortgagee was, as a principal, jointly liable with the mortgagors for the debt. This being a Kansas contract, the construction and effect that would be given to it by the supreme court of that State should govern this court. The securing of payment of the creditor's claim is regarded as the primary object of the transaction.

AGREEMENT FOR DEPOSIT OF MONEY IN JOINT NAMES OF THE RECEIVER AND ADMINISTRATOR CONFERRED NO ADDITIONAL RIGHTS.

In the receiver's supplemental brief it seems to be contended that the effect of the stipulation entered into for the sale of the cattle and the holding of the proceeds was to vest them in the receiver, unless some one established a superior right. We do not so understand it. The receiver was acting in the capacity of agent or trustee for all the parties in the sale of the property and the deposit of the proceeds. It was the same as if the fund had been paid into court to abide its determination of the disputed right to it. The agreement or stipulation itself expressly forestalls any such contention.

"It is expressly stipulated and agreed that none of the rights of the parties hereto in and to said cattle shall be prejudiced in any manner, but that all of said rights shall attach to and be vested in the said net proceeds derived from the sale of said cattle and other personal property, as fully and to the same extent as to the said cattle and other personal property, and the making of this agreement and the sale of said cattle and other personal property shall work no estoppel against any of the parties hereto." * * *

It is claimed now that the receiver "needs no affirmative relief;" that all he has to do is to hold on in spite of his agreement that he can assert no right to this fund which he could not maintain as to the cattle. Such a contention fur-

nishes its own refutation, and merely demonstrates the vital importance of explicit written agreements under some circumstances.

ADMISSION OF DECLARATION OF MARTINDALE TO ALBAUGH AND LAMBERT.

We concede that if such declarations were pertinent to a proper cross-examination of Martindale they might be competent for the purpose of impeachment, and Martindale might be asked about them to refresh his memory, or, if he should be considered as the witness of the receiver as to the March bill of sale, he might be asked about the statements to show that the receiver was taken by surprise by the testimony given in court, and, according to some authorities, the previous declarations might be shown; but the purpose of such evidence and the ground on which it is admitted is to protect the party calling the witness from the effect of his testimony given in court. It is not competent as independent evidence to prove the fact about which the declarations were made.

The statements made out of court, not under the sanction of an oath, do not rise to the dignity of original evidence on the issues of the case, but are admissible merely because of the bearing they may have on the credibility of the witness. Of course, there are exceptions, as in the case of statements against interest by a party to the suit, but this is not one of them.

It must be kept in mind that these declarations testified

to by Albaugh and Lambert were solely with reference to the bill of sale under which the receiver claims.

They did not tend to put in dispute anything Martindale had testified concerning the July and November bills of sale. The receiver claims through Martindale, and sustained to him much the same relation that existed between Martindale and the appellants. By Martindale the receiver tries to explain the otherwise meaningless March bill of sale. The witness testifies about it and tells what it was given for. The testimony does not, however, support the receiver's claims. He might refuse to accept such testimony as the truth and prove the facts to be otherwise by other witnesses. But he does not do that. He shows that Martindale stated differently out of court, or was understood to state differently, and the court takes these unsworn statements as proving a fact in dispute against the sworn testimony given by the witness in court.

Suppose that on the trial Martindale, testifying as a witness called by appellants, had said that the $30,000 due the New York bank was not one of the debts intended to be secured by the July and November bills of sale, and then that bank had proposed to prove that it was included by showing that Martindale had so stated out of court at some previous time, would any court have hesitated to say that such fact could not be proven in that way? Yet that is exactly what was done in this case in behalf of the receiver respecting his bill of sale. If there is any law to sustain such a decision it has escaped our attention.

CONCLUSION.

Other questions are fully discussed in our original brief, and we will not repeat what we have there said. We emphasize our contention that there is no competent evidence to sustain a decree awarding this entire fund to the receiver by virtue of the March bill of sale.

Respectfully submitted.

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